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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MUSTAFA A. WRIGHT, Defendant and Appellant.	B147832 (Super. Ct. No. LA035287)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle R. Rosenblatt and Michael Hoff, Judges. Affirmed.

R. Charles Johnson, under appointment by the Court of Appeal, and Nancy Mazza, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Renee Rich, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Mustafa A. Wright challenges his second degree robbery conviction on the grounds the trial court abused its discretion in denying his mid-trial motion to withdraw his waiver of his right to a jury trial and his post-trial motion to vacate its findings of prior "strike" convictions. He also contends the duration of his Three Strikes sentence is unconstitutional, and his prior convictions supported only one of the two Penal Code section 667, subdivision (a)(1) enhancements imposed because the underlying offenses were not prosecuted and tried separately.

We conclude the trial court's denial of appellant's motion to withdraw his jury waiver was a proper exercise of discretion, as was its denial of his motion to vacate its findings that he had sustained "strike" priors. The court properly found appellant's prior serious felony convictions arising from two different cases were prosecuted and tried separately, even though he pled guilty to all charges in both cases during a single proceeding. By failing to raise the issue in the trial court, appellant waived any claim the length of his sentence is unconstitutionally disproportionate.

BACKGROUND AND PROCEDURAL HISTORY

Appellant entered a paycheck cash advance business establishment and asked about obtaining an advance. He placed his wallet on the counter and pointed a gun at the clerk. Appellant moved behind the counter and instructed the clerk to open both cash drawers and the safe. Two masked accomplices entered the business establishment. Appellant took the money from both cash drawers and the safe, but neglected to retrieve his wallet from the counter.

Appellant waived a jury and was tried by the court. The court convicted him of second-degree robbery and found he personally used a gun in the commission of the crime. The court also found appellant suffered two prior serious felony convictions within the meaning of the Three Strikes law and Penal Code section 667, subdivision (a)(1), and served two prior prison terms within the meaning of Code section 667.5, subdivision (b). The court sentenced appellant to prison for 45 years to life, consisting of

a 25-years-to-life Three Strikes term for robbery, a 10-year enhancement for using a gun, under Penal Code section 12022.53, subdivision (b), and two 5-year Penal Code section 667, subdivision (a)(1) enhancements.

DISCUSSION

1. The trial court properly found appellant was convicted of serious felonies in two prior cases brought and tried separately.

The two Penal Code section 667, subdivision (a)(1) enhancements imposed were based upon appellant's prior robbery and attempted robbery convictions in Los Angeles County Superior Court case numbers LA011982 and LA011877. The only evidence offered by the prosecution about the history or circumstances of the prior convictions consisted of the abstracts of judgment. The abstract in LA011982 indicates on April 22, 1993, appellant pled guilty to two counts of second degree robbery, one count of attempted second degree robbery, and one count of unlawfully taking a vehicle. The abstract indicates all four counts were committed in 1992. Appellant also apparently admitted he or an accomplice used a gun in the commission of both robberies and the attempted robbery. The court sentenced appellant to 7 years 4 months in prison. The amended abstract of judgment in LA011877 reflects a guilty plea on April 22, 1993 to one count of second degree robbery, also committed in 1992, for which appellant was sentenced to one year. The amended abstract in LA011877 also lists all counts and enhancements from case number LA011982 and indicate the terms in both cases were fully consecutive. The abstracts show that all participants—the judge, the deputy district attorney, and defense counsel—were the same in both cases, and appellant was sentenced in both cases on the same date.

Appellant contends the prosecution failed to prove the two prior cases were brought and tried separately.

Penal Code section 667, subdivision (a)(1), provides that a defendant who is convicted of a serious felony, as defined in section 1192.7, must receive a five-year sentence enhancement "for each such prior conviction on charges brought and tried

separately." To satisfy the "brought and tried separately" requirement, prior proceedings must be formally distinct from filing to adjudication of guilt. (*In re Harris* (1989) 49 Cal.3d 131, 136.)

Charges are "brought," within the meaning of Penal Code section 667, subdivision (a)(1), by the filing of a felony complaint, not the filing of an information. (*In re Harris*, *supra*, 49 Cal.3d at p. 137.) The evidence does not indicate whether the two cases, numbers LA011877 and LA011982, were initiated by separate felony complaints. Absent contrary evidence, however, the circumstance that their superior court case numbers differ significantly supports a reasonable inference that the charges were filed in separate complaints, that is, were "brought" separately. (*People v. Wiley* (1995) 9 Cal.4th 580, 593.) The separate abstracts of judgment for cases LA011877 and LA011982 indicate the cases were not consolidated, and thus remained formally separate prior to the guilty plea.

The adjudication of guilt in both prior cases stemmed from appellant's guilty plea. The mere fact he pled guilty and was sentenced in both cases on the same day does not constitute a de facto consolidation. (*People v. Wagner* (1994) 21 Cal.App.4th 729, 737; *People v. Gonzales* (1990) 220 Cal.App.3d 134, 140-142; *People v. Thomas* (1990) 219 Cal.App.3d 134, 145-147.) Temporal separation is not required, as public policy is served by the efficient disposition of multiple cases in contemporaneous proceedings. (*People v. Gonzales*, *supra*, 220 Cal.App.3d at pp. 140-141.) The enduring formal distinction between the two cases is supported by the imposition of separate consecutive sentences in each case. Although appellant received custody credits on only one of the cases, his incarceration while both cases were pending would entitle him to credits on only one of the two cases. (Pen. Code, § 2900.5, subd. (b).) Thus, the trial court could reasonably conclude cases LA011877 and LA011982 remained formally distinct through the adjudication of guilt.

2. The trial court did not abuse its discretion by denying appellant's motion to withdraw his jury waiver.

On the day appellant's trial was scheduled to begin, counsel told Judge Rosenblatt that everyone agreed to a court trial before Judge Hoff. Defense counsel stated he discussed the matter with appellant, and both agreed to waive jury and try the case before Judge Hoff. Judge Rosenblatt told appellant he had a right to a jury trial "where 12 people, citizens of the community, are selected to serve as jurors. They are the ones who would hear the evidence that is presented, and their verdict would have to be unanimous, okay. That's what a jury trial is. Do you understand your right to have a jury trial?" Appellant said he did. The court then asked appellant, "Do you waive and give up that right and agree to have a court trial before Judge Michael Hoff?" Appellant replied, "Yes, your honor." Defense counsel and the prosecutor joined in the waiver, and the case was transferred to Judge Hoff for trial. Appellant's court trial commenced the same day.

Nine days later, on the fifth day of trial, appellant asked the court to allow him to withdraw his jury waiver. He told the court that at the time of the waiver, he was "under duress" having just been attacked by two fellow inmates. In the melee he broke his hand and was sprayed with pepper spray. In addition to his usual medications, he had received something for pain. He claimed that when he was asked whether he wanted a court or jury trial, he simply agreed and "wasn't really coherent to what [he] was agreeing to." He explained that he had not raised the issue earlier because he feared it might make him look guilty.

Defense counsel confirmed that appellant's hand was bandaged at the time he waived a jury and the bailiff had told him appellant was involved in a jailhouse altercation. Counsel also told the court he and appellant discussed whether they should waive a jury, but declined to say more for fear of relating privileged matters. Counsel suggested the court could order medical records from the jail to ascertain the medications in appellant's system when he waived a jury. Appellant identified his medications, except for the pain medication. He claimed he was in pain at the time of the waiver and

did not know what he was saying. He was told it was convenient to have a court trial because there were no courts available at the time.

The trial court asked who took the waiver and whether any findings were made. Defense counsel told the court it was a standard waiver, taken by Judge Rosenblatt. The court denied appellant's motion to withdraw his jury waiver.

Appellant does not challenge the adequacy of Judge Rosenblatt's advisement or inquiry, but contends Judge Hoff failed to conduct a sufficient inquiry to determine whether appellant voluntarily, knowingly, and intelligently waived his right to a jury trial.

A defendant may waive the right to a jury trial. As with other constitutional rights, the trial court may not accept such a waiver unless it is knowing and intelligent, that is, made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. (*People v. Collins* (2001) 26 Cal.4th 297, 305.) In addition, the waiver must be voluntary, "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*Ibid.*)

If the right to trial by jury is effectively waived, a court may, in its discretion, allow the defendant to withdraw the waiver and have a jury trial. (*People v. Chambers* (1972) 7 Cal.3d 666, 670.) In exercising its discretion, a court may consider such matters "as the timeliness of the motion to withdraw the waiver, the reason for the requested withdrawal and the possibility that undue delay of the trial or inconvenience to witnesses would result from granting the motion." (*Id.* at pp. 670-671.) In *Chambers*, the defendant waived a jury trial, but attempted to withdraw his waiver later the same day, before trial started. The Supreme Court upheld the denial of the motion to withdraw the jury waiver on the ground the motion to withdraw was untimely and no special circumstances existed that were sufficient to outweigh the delay, inconvenience and potential prejudice that would result from granting the motion. (*Id.* at p. 671.)

The record contains no responses or circumstances that might reasonably have caused Judge Rosenblatt to suspect appellant did not understand his right to a jury trial or

that his waiver was not knowing, intelligent and voluntary. She explained the nature of a jury trial and appellant said he understood. He stated he waived his right to trial by jury and agreed to be tried by Judge Hoff. Defense counsel and the prosecutor joined in the waiver. Thus, appellant properly waived his right to a jury trial.

As agreed, Judge Hoff began trying the case later the same day, but appellant said nothing about withdrawing his jury waiver until more than one week later, on the fifth day of testimony. Appellant's motion was thus untimely. Had the court granted the motion, it would have been required to declare a mistrial, empanel a jury, and begin a new trial. Doing so would have inconvenienced the witnesses who had already testified and those scheduled to testify that day. It would also create a risk of additional delay, depending on the availability of jurors and the schedules of the court and counsel. Delay would, in turn, create a risk of prejudice through potential loss of witnesses and degradation of witnesses' memories. Moreover, the court had already heard testimony from victim Charles Gilliam that people claiming to be members of appellant's family had threatened him and caused him to modify his initial identification testimony at trial to avoid reprisals from appellant's supporters. Thus, the unique circumstances of this case suggested an unusually strong risk of prejudice to the People through additional delay.

Weighed against these compelling reasons to deny the motion was appellant's unsupported claim of incoherence at the time of the waiver. Although Judge Hoff did not have the transcript of the jury waiver at the time he denied appellant's motion, our review of that transcript reveals it would have made no difference. The transcript of the waiver and defense counsel's acknowledgement–made during the motion to withdraw the waiver–that he and appellant discussed the possibility of waiving a jury, substantially contradicted appellant's claimed incoherence.

Although the court could have conducted further inquiry regarding the medication appellant had taken at the jail, it did not abuse its discretion by declining to do so. Given appellant's inexcusable delay in seeking to withdraw the waiver and the substantial detriment that would ensue if the court granted his motion, we conclude the trial court

properly exercised its discretion by denying the motion to withdraw the jury trial waiver.

3. The trial court's denial of appellant's *Romero* motion was not an abuse of discretion.

Prior to sentencing, appellant asked the trial court to dismiss one or both prior "strike" conviction findings. He argued he was just 18 at the time of his 1992 convictions, he pled guilty to those charges, and his life had changed in that he now had a young daughter. The court denied the motion, explaining it found no legal or logical reason to vacate any of the priors. The court noted appellant had several sustained juvenile petitions, several adult felony convictions, had been incarcerated, was on parole at the time of the current offense, and showed "continued criminality since 1989."

Appellant contends the trial court abused its discretion in declining to vacate one of the strike conviction findings and treating his current offense as a second strike case.

A trial court has discretion under the Three Strikes law to dismiss or vacate prior conviction allegations or findings in the furtherance of justice. (Pen. Code, § 1385, subd. (a); *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530.) In exercising this power, the court must consider the defendant's background, his constitutional rights, the nature of the current offense, and the interests of society. (*Id.* at pp. 530-531.) The court should not dismiss or vacate a "strike" unless it concludes that the defendant may be deemed to be outside the anti-recidivist "spirit" of the Three Strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Appellant cannot reasonably be characterized as outside of the spirit of the Three Strikes law. His juvenile record began when he was 14 years old and includes sustained petitions for grand theft auto, petty theft, taking a vehicle without consent, and possessing a firearm on school grounds. Appellant was granted probation for the first sustained petition, but placed in camp for the final three sustained petitions. Less than two months after he was released from camp in 1992, he was convicted of taking another vehicle without consent and placed on summary probation. One month later he committed three robberies, one attempted robbery, and took another vehicle without consent. Appellant

admitted he personally used a gun in the commission of one of the robberies, and a principal was armed with a gun in the attempted robbery and another robbery count. He was convicted of all of these crimes in the Los Angeles County Superior Court cases discussed in the context of the first issue and received a prison term of 8 years 4 months. He was on parole release for those crimes when he committed the instant robbery. His current offense was an extremely serious offense creating a substantial risk of injury or death. The current offense clearly fits his pattern of behavior, including gun use, and there were no apparent mitigating factors. It thus showed appellant continued to pose a significant danger to society.

Appellant argues he was mentally ill, but no evidence was offered to support this claim. When appellant attempted to withdraw his jury waiver, he told the court he was taking an anti-depressant at the time he waived a jury. However, nothing indicates he was depressed or suffered from mental illness at the time of the robbery. The probation officer who prepared the probation report found no indication of significant physical, mental, or emotional health problems.

Appellant further argues he was not a successful or sophisticated thief because he did not take a large amount of money in any of his prior robberies and made errors like leaving his wallet on the counter at the cash advance business. However, in enacting the Three Strikes law, the Legislature and electorate did not limit its application to a subset of successful and sophisticated criminals who carry out flawless crimes. Moreover, in his current offense, appellant stole $3,181, which is hardly a trivial sum. Although appellant blundered by leaving his wallet on the counter, other aspects of the crime indicate it was planned with significant expertise or sophistication. Appellant entered the business establishment alone and pretended he wanted a cash advance. Appellant's two accomplices wore masks and waited until appellant abandoned the ruse to enter the business. Appellant's accomplices demanded and obtained the security videotape and ripped out the phone to prevent Gilliam calling the police.

Contrary to appellant's contentions in the trial court and on appeal, neither the

birth of appellant's child shortly before the current offense nor his 1992 guilty pleas placed him outside the anti-recidivist spirit of the Three Strikes law. Appellant also refers to his stable relationship with the mother of his child. The court expressly indicated it had read the probation report and letters written on behalf of appellant by his family members. However, neither appellant's prior guilty pleas, his prior incarceration, nor the birth of his daughter two weeks before the current offense prevented appellant from resuming his career as an armed robber. Moreover, appellant testified at trial he was having an affair with a different woman, and he was with her at a friend's apartment when the robbery occurred. In light of this testimony, the trial court could reasonably discount appellant's contention he had been transformed by his new family ties.

For all of these reasons, the court did not abuse its discretion in finding that appellant fell squarely within the spirit of the Three Strikes law and denying appellant's *Romero* motion.

4. Appellant waived any claim the length of his sentence is unconstitutionally disproportionate.

Appellant contends the length of his 45-years-to-life sentence violates the state and federal constitutions.

Appellant waived this issue by failing to raise it in the trial court. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Even if appellant did not waive the issue, we would not find the length of his sentence disproportionate under state or federal standards.

Traditionally, Eighth Amendment proportionality analysis has focused upon the gravity of the offense and harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. (*Solem* v. *Helm* (1983) 463 U.S. 277, 292.) However, *Harmelin* v. *Michigan* (1991) 501 U.S. 957, which contained no majority opinion, cast doubt on the continuing validity of a proportionality challenge in a non-capital case. Two justices concluded the Eighth Amendment contains no proportionality guarantee (*id.*

at p. 965 [opn. of Scalia, J.]) and three other justices concluded the amendment forbids only those sentences which are "grossly disproportionate" to the crime (*id.* at p. 1001 [opinion of Kennedy, J.]). Even those justices recognizing a guarantee of proportionality stressed that, outside the context of capital punishment, successful challenges to particular sentences are "exceedingly rare" because of the "relative lack of objective standards concerning terms of imprisonment." (*Ibid.*)

Under the Three Strikes law, defendants are punished not just for their current offense but also for their recidivism. *Rummel* v. *Estelle* (1980) 445 U.S. 263, recognized that recidivist felons pose a danger to society which justifies the imposition of lengthy sentences for even relatively minor subsequent offenses. (*Id.* at p. 284.) The court noted that the length of and prerequisites for imposition of such a sentence are largely within the punishing jurisdiction's discretion. (*Id.* at pp. 284-285.) Therefore, even if the Three Strikes law punishes more severely than other recidivist measures, such severity does not render the punishment grossly disproportionate to the crime. (*Harmelin* v. *Michigan*, *supra*, 501 U.S. at p. 1005; *Rummel* v. *Estelle*, *supra*, 445 U.S. at pp. 284-285.)

The basic test of a cruel or unusual punishment under the California Constitution is whether it is so disproportionate to the crime as to shock the conscience and offend fundamental notions of human dignity. (*People* v. *Dillon*, (1983) 34 Cal.3d 441, 478; *In re Lynch* (1972) 8 Cal.3d 410, 424.) The thrust of the analysis is to examine the nature of the offense and of the offender. (*Dillon*, at p. 479.) The court must consider the nature of the offense in the abstract and the facts of the crime in the particular case, including factors such as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences. (*Ibid.*) With respect to the nature of the offender, the question is whether the punishment is "grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*) Appellant must overcome a considerable burden in convincing us that his sentence is disproportionate. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

Appellant's Three Strikes sentence was predicated on his current felony conviction coupled with his prior robbery and attempted robbery convictions. (Pen. Code, § 1170.12, subd. (b)(1).) In regard to appellant's *Romero* motion, he was convicted of other crimes, including two additional armed robberies and four car thefts. He spent a number of years in prison and was on parole for the 1992 robberies and car theft when, at age 25, he committed the current offense. The current offense, an invasion-style robbery with a firearm, posed a high risk of violence, injury, and death. The actions of appellant and his accomplices revealed significant planning and sophistication. Appellant's history of recidivism coupled with his very serious current offense justifies the Three Strikes term imposed.

Of appellant's sentence, 20 years is attributable to enhancements for his personal use of a gun in committing the robbery (Penal Code section 12022.53,subdivision (b)) and his two prior serious felonies (Penal Code section 667, subdivision (a)(1)), rather than the Three Strikes law. Appellant does not specifically challenge the proportionality of the enhancement terms.

DISPOSITION

The judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.